

Espinoza overruled Crouch and did *not* build a station in Houston that Crouch wanted built.^{26/} And when minority Board member Philip Aguilar was traveling, Crouch called him to solicit his views. (TBF Ex. 107, pp. 148, 176-77) The ALJ largely ignores the detailed record of decisions in which the minority Board members participated, which were important reasons why Crouch believed that NMTV really did function under minority control.^{27/} To the ALJ, it did not matter what Crouch believed: "I'm not going to get into his beliefs. That's irrelevant." (Tr. 758) This was patent error, since state of mind is the central issue when intentional misconduct is alleged. The evidence of what Crouch believed and how NMTV served minorities, if considered fairly, establishes that he never thought NMTV was a sham.

Dr. Crouch Had No Intent To Deceive the FCC. Having erroneously concluded that Crouch considered NMTV a sham, the ALJ also wrongly held that Crouch intended to

^{26/} TBF Ex. 101, pp. 2-3 and Tab A; Ex. 104, p. 12; Ex. 106, p. 12; Tr. 1499-1502, 1822-23, 1872, 2299-2300, 2388-89, 2813, 4213, 4216, 4220; TBF F&C ¶¶47-53.

^{27/} TBF Ex. 101, Tab EE; Tr. passim. The description of the record in the ID is so one-sided that it more resembles a prosecution than an adjudication. During admissions, the ALJ said that he was interested in "minutes of meetings" and other facts that would show "what board members participated in." (Tr. 494) But when TBF spelled out such evidence in great detail (TBF F&C ¶¶ 40-175, TBF Rep F&C ¶¶106-21), the ALJ ignored it. Hence, the ID addresses only a fraction of the record. For example, in ¶91 the ALJ finds that Duff, "with Crouch's concurrence," hired James McClellan to manage NMTV's Portland station. Completely omitted are *Espinoza's* participation in that decision; his knowledge of McClellan's management experience and sensitivity to minority problems; and his strong support for hiring McClellan. (TBF Ex. 106, p. 13; Tr. 4381) In ¶118 the ALJ finds that Aguilar's opinions did not lead to program development and he did not go to Portland and visit the station. Completely omitted are Aguilar's discussions with the Board and McClellan about minority programming and community involvement; his desire for programs about gangs and minority culture; McClellan's fulfillment of those goals; and the fact that Aguilar *did* visit Portland and spent four hours talking to people in the community about NMTV's service to minorities. (TBF Ex. 107, pp. 117, 119, 131-32, 202; Tr. 4435) Further, the ID ignores the decision on the Houston station altogether.

conceal its relationship with TBN. That finding, too, is unsustainable in light of the disclosures TBN and NMTV made and the public visibility in which they functioned. As indicated, 17 LPTV applications NMTV filed at the outset openly disclosed that TBN and NMTV had the same CEO, a majority of common directors, and close programming and financial ties. NMTV pleadings also reported that it would rebroadcast TBN's signal. (TBF Ex. 101, p. 26 and Tab N) Six ownership reports filed from 1985-1990 disclosed that TBN officers also served as NMTV officers. (TBF Ex. 101, Tab R, pp. 1-19, 39-72, 73, 79, 80, 84, 86; TBF F&C ¶267) TBN's Engineering Vice President Ben Miller personally signed *seven* NMTV applications while also signing many other applications showing his position at TBN, which was a matter of public record at the FCC.^{28/} When NMTV applied for the Odessa full-power station, Colby May had meetings with senior FCC staff attorney Alan Glasser and informed him that TBN would be *financing* NMTV, that TBN would supply NMTV's *programming*, and that TBN *employed* NMTV Director Duff. (TBF Ex. 105, p. 17; Tr. 3232-38; TBF F&C ¶259-60) The Odessa application cited NMTV's pending LPTV applications, which in turn likewise disclosed TBN's financial and programming connections to NMTV. (TBF Ex. 101, Tab Q, p. 32; Tr. 3236, 3238) May also spoke with senior Bureau official Roy Stewart and then submitted NMTV's Bylaws, which specified that the President (identified in the application as Crouch) had authority subject to the Board to "supervise, direct and control the business and the officers of the corporation" and to "select and remove all agents and employees of the corporation." (TBF Ex. 101, Tab I, pp. 1, 14; TBF F&C ¶30) The

^{28/} MMB Ex. 149, pp. 1, 9; MMB Ex. 224, pp. 1, 4; TBF Ex. 101, Tab V, pp. 49, 52-54, 57, 61, 74, 77, 79, 80, 88, 92-96, 105, 109-10, 112-13, 125, 141, 142-43, 183-85, 211-15, 217, 232; TBF Ex. 122, pp. 47-48, 50-51; TBF Ex. 123, pp. 1, 4, 5, 7, 10, 12; TBF F&C ¶203.

Bylaws also listed NMTV's principal place of business as "2442 Michelle, Tustin CA," which many TBN filings identified as TBN's address. (TBF Ex. 101, Tab I, p. 5 and Tab H; Ex. 122, p. 158) In addition, more than *eighty* documents were filed showing that Duff had an ongoing association with TBN (TBF Ex. 122), including documents reporting that she was "Administrative Assistant to the President" of TBN, had "overall responsibility for equal employment opportunity" for TBN, should receive notices at TBN's address, and was both an employee of TBN and an officer and Director of NMTV. (*Id.*, pp. 158, 160, 252, 254, 256; TBF F&C ¶66) These disclosures negate any inference that Crouch meant to conceal the TBN/NMTV relationship from the FCC.^{29/}

Further, Duff's important management position at TBN was in full public view. She appeared publicly at industry functions throughout the country, openly represented TBN at civic organizations and in the community, and conducted TBN business with third parties. (*Id.* ¶14; TBF Ex. 233) Hence, it is obvious that nobody was trying to hide her continuing role at TBN while she was a Director of NMTV. The fact that the activity Crouch is accused of concealing was carried out in plain sight negates a finding that he intended to conceal it. Christian Broadcasting of the Midlands, Inc., 2 FCC Rcd 6404, 6406 (1987).

In concluding otherwise, the ALJ largely ignored the facts and completely ignored the

^{29/} Pinelands, Inc., 7 FCC Rcd 6058, 6065, n. 28 (1992); WWOR-TV, Inc., 6 FCC Rcd 193, 206 (1990); Calvary Educational Broadcasting Network, Inc., 9 FCC Rcd 6412, 6420 (Rev. Bd. 1994); Barry Skidelsky, 7 FCC Rcd 1, 3 (Rev. Bd. 1992); Valley Broadcasting Company, 4 FCC Rcd 2611, 2615-16 (Rev. Bd. 1989); Omaha Channel 54 Broadcasting Group, Limited Partnership, 3 FCC Rcd 870, 871 (Rev. Bd. 1988); Intercontinental Radio, Inc., 98 FCC 2d 608, 639-40 (Rev. Bd. 1984); Superior Broadcasting of California, 94 FCC 2d 904, 910 (Rev. Bd. 1983); WGUF, Inc., 58 FCC 2d 1382, 1383 (Rev. Bd. 1976); Mesabi Communications Systems, Inc., 57 FCC 2d 832, 834 (Rev. Bd. 1976); Vogel-Ellington Corp., 41 FCC 2d 1005, 1011 (Rev. Bd. 1973).

law. (ID ¶¶326, 329-32). The only disclosures he addressed were the FCC filings reflecting Duff's association with TBN, and from them he drew the wrong conclusion. (ID n. 47)^{30/} The ALJ ignored all of the *other* disclosures cited above. Most significantly, he ignored May's uncontradicted testimony that when NMTV filed the Odessa application under the minority exception rule, he *told* the FCC staff that TBN would provide financing and programming to NMTV and that NMTV Director Duff was a TBN employee. (TBF F&C ¶¶259-60, 667) That evidence is pivotal, because it shows beyond any reasonable dispute that TBN did not intend to conceal the relationship between TBN and NMTV on the key elements of financing, programming, and personnel. As held in Fox, where the licensee had generally disclosed the financial involvement of a foreign company:

"In light of those disclosures, and given the state of the law at the time, we find that FTS's failure to be more explicit did not reflect an intent to avoid scrutiny of News Corp.'s financial stake in FTS, which ... might have raised questions of *de facto* control." Fox, supra, 10 FCC Rcd at 8490.

And as the Commission also held in Fox, when the licensee's counsel goes to the FCC staff and discusses the application, that is "inconsistent with an intent to deceive, but consistent with a desire to ensure that the Commission had whatever information it needed." Id. The Bureau agrees that the disclosures negate any finding of intentional concealment:

"The Bureau agrees with Trinity that NMTV's failure to disclose the nature and extent of its relationship in its applications, *when considered with contemporaneous disclosures in other submissions to the Commission*, indicates that NMTV's omissions did not occur because of an intent to deceive the Commission. [n. 5] ... Thus, the Bureau believes that loss of TBF's license is *not* the appropriate sanction." (MMB Rep F&C ¶35)

^{30/} The Board can review for itself the more than eighty documents showing Duff's association with TBN (TBF Ex. 122) and draw its own conclusion whether such submissions reflect a scheme to conceal that association from the FCC.

The ALJ's failure to address the crucial evidence of disclosures made in this case defies understanding and thoroughly impugns his finding that Crouch sought to deceive the FCC.

Moreover, the ALJ based his finding of intentional concealment almost entirely on a blatant misreading of Crouch's testimony. (ID ¶¶65, 332) The record establishes that Crouch gave May standing instructions to provide the FCC with all information that May considered relevant. On that point, May testified:

"Dr. Crouch has always ... made it very clear to me that he wants there to be a complete and open disclosure to the Agency of all factors that, that I felt were -- or that, that should be reported to them and that he would -- frankly, he relied on me for that material, but he certainly directed that I make sure that be done." (Tr. 3202-03)

* * * * *

"[I]t has been clear to me for the period of time that I have represented Dr. Crouch and the companies that he is involved in, that that's been his instruction that that be done and he relies on me in gathering the material and putting the material together in the application and submitting it and processing it at the FCC." (Tr. 3380)

Those standing instructions arose from a matter in the early 1980s in which May proved his integrity to Crouch. In a license renewal hearing involving TBN's flagship station (KTBN), Crouch's prior FCC counsel had invoked attorney-client privilege to withhold documents damaging to TBN, even though Crouch had ordered full disclosure. May, then an associate in the firm, did not agree that privilege should be claimed and felt strongly that the damaging documents he found in the files be put on the record. When Crouch learned of the documents through May's intervention, he ordered them produced. International Panorama TV, Inc., FCC 83D-4 (ALJ 1/25/83) (SAL Ex. 35), p. 18 (¶67), p. 21 (¶6 and n. 38); Tr. 3572-73) Thus, in a hearing with TBN's entire network at stake, May showed that he could be trusted to report even harmful information to the FCC. When May later opened his own

law firm, Crouch retained him as TBN's counsel (MMB Ex. 59) and thereafter relied on him to assure that TBN made all appropriate disclosures to the FCC (Tr. 3202-03, 3380).^{31/}

That history directly informs Crouch's actions in this case. Crouch testified that he relied on May to prepare NMTV's applications and, aware that NMTV was the first applicant to seek a minority exception under the FCC's new policy (Tr. 2674), told May to put on the record everything May thought necessary. (TBF Ex. 104, pp. 14, 15; Tr. 2699, 2711, 2755-57) May corroborated that testimony, affirming that Crouch:

- "relied on *me* to prepare [and] present the material that *I thought* was required" (Tr. 3197);
- "relied on *me*" for "a complete and open disclosure to the Agency of all factors that*I felt*....should be reported to them" (Tr. 3202);
- "said: Look, you tell me. I'm going to rely on you, Mr. May. If this policy works for us, then you do it and you submit to them any and all material that *you think is important or relevant or that [the] Agency ought to know*, because I want them to know everything that they're supposed to know" (Tr. 3206); and
- "relied on *me* to make that evaluation and to advise him accordingly and then prepare the documents and to submit to the Commission those things that *I thought* were part of the process and required in the process" (Tr. 3379). (TBF F&C ¶257)

Ignoring all of this corroboration by May, the ALJ rejected Crouch's testimony as "not credible" on the ground that Crouch "sought to retract" earlier testimony and made a "belated attempt to place the onus on his counsel." (ID ¶65) That reading, plainly erroneous, is based

^{31/} Stretching to find fault with Crouch as a result of International Panorama (ID n. 50), the ALJ completely ignored the real significance of that decision for this case: it unequivocally affirmed Crouch's good faith and good intentions in dealing with the FCC. The decision held that Crouch "is innocent of any misrepresentation or wrongdoing" and "would have directed immediate disclosure of these letters had he been made aware of their existence." (SAL Ex. 35, p. 21 (¶7 and n. 38)) Moreover, Crouch's experience in that case justified his good faith reliance on Colby May as an attorney he knew would deal openly and honestly with the FCC.

on a perceived inconsistency in Crouch's testimony that does not exist. In his earlier response, Crouch said he told May to put everything on the record and make clear to the FCC what the relationship was between NMTV and TBN. (Tr. 2674) In the later response cited by the ALJ, he said he instructed his counsel to put on the record everything that counsel felt necessary to put on the record. (Tr. 2755) Since *both* responses said that Crouch instructed and relied on counsel to prepare the information needed for filing, the later response plainly was not a "belated" claim of reliance on counsel. The testimony of both Crouch and May (set forth above) unmistakably establishes that Crouch relied on May to prepare the applications as appropriate. There is absolutely no evidence that Crouch wanted May, or ever told May, to withhold something May thought should be disclosed.

Nor did Crouch "recant" earlier testimony. When Crouch said that he told May to put on the record everything about the relationship between NMTV and TBN (Tr. 2674), he clearly meant everything that was *relevant*, since there would never be reason to submit matter *not relevant* to the FCC's determination. Understandably, Crouch himself "didn't know what all of the information was necessary" for inclusion in the application. (Tr. 2756, 2757) Since the application required a legal interpretation of a new policy, he had to rely on counsel for that. When the ALJ asked why the application did not mention Duff's role in TBN, Crouch explained that "I sincerely instructed Mr. May to make whatever information *he felt necessary* available to the agency to see if we did indeed qualify for the exception of twelve *and I trusted him to do that.*" (Tr. 2711) When the ALJ later revisited the subject, Crouch realized that the ALJ had misinterpreted his earlier testimony and reiterated, "Sir, I think what my testimony will reveal is that what I instructed my counsel to do was to file

and put on the record everything *he felt necessary* to put on the record." (Tr. 2755) That in fact is precisely what Crouch *had* testified. (Tr. 2711) Both statements clarified what his initial response (Tr. 2674) obviously meant, namely that he had directed May to disclose everything that May deemed relevant. Clarification is not recantation, and the ALJ's critical misperception of Crouch's testimony is no basis for disqualifying TBF.^{32/}

The whole record -- including May's corroborating testimony -- makes clear that Crouch gave May a standing instruction, which he specifically reiterated for the NMTV applications, to submit all information May deemed necessary. The reason the applications did not go into detail about the relationship between TBN and NMTV was not that Crouch wanted such information concealed, but that May considered it unnecessary. May firmly stated that although he was familiar with TBN's involvement with NMTV, he did not think it had to be detailed in the application because, to his understanding, the minority incentive policy (a) defined minority control purely in terms of ownership (as Commissioner Patrick had stated), (b) specified that the "owners" of a nonstock corporation are its directors, and (c) authorized TBN to have a cognizable interest that allowed active involvement in NMTV's operation.^{33/} Explaining why he did not regard the particulars of TBN's activity as

^{32/} No deference is owed to the ALJ's adverse credibility finding premised on "Crouch's attempt to revise his testimony" (ID n. 49). That finding is not based on demeanor, and (as discussed above) Crouch did not attempt to "revise" his testimony. Nancy Naleszkiewicz, 10 FCC Rcd 1083, 1094 (¶55) (1995) (no special deference is given to credibility findings based on inferences drawn from recorded testimony rather than on witness demeanor); WHW Enterprises, Inc. v. FCC, 753 F.2d 1132, 1141 (D.C. Cir. 1985) (reversal of credibility findings appropriate if reversal is supported by substantial evidence).

^{33/} Tr. 3067, 3168-69, 3200-01, 3203-06, 3220-25, 3236, 3238, 3258, 3279-81, 3333, 3370-77, 3394, 3396, 3398, 3491-94, 3575, 3604; TBF Ex. 105, pp. 13-18, 21; TBF F&C ¶¶227-33, 258.

significant, May testified that he thought --

"that the requirements and the specifications under the rule of fourteen went to the issue of the Board of Directors for a non-profit company and who they were ... if they were, in fact, directors then I believed that they met the exception under the rule and it was appropriate to proceed accordingly." (Tr. 3377)

This testimony is uncontradicted. Also uncontradicted is May's testimony that he discussed the TBN/NMTV relationship with senior FCC staff attorney Alan Glasser when the Odessa application was filed -- discussions that belie a secretive agenda. As the Court of Appeals and the FCC have repeatedly held, sworn testimony that is not contradicted or inherently incredible is dispositive.^{34/} Thus, May's testimony must be taken as establishing beyond dispute that any perceived deficiencies in the disclosures made by NMTV in its applications are attributable solely to the legal interpretation and understanding of NMTV's counsel and *not* to bad faith on the part of Paul Crouch. As the FCC has made very clear:

"We do not think it appropriate to find a lack of candor where a licensee has not second guessed its own attorneys, as long as the advice rendered appears reasonable and is relied on in good faith. We do not wish to create an environment in which licensees are discouraged from seeking and following the advice of legal counsel." Fox, supra, 10 FCC Rcd at 8501, n. 68.

The ALJ's finding of bad faith, based almost totally on his misperception that Crouch gave inconsistent testimony (ID ¶65 and n. 49), is plainly erroneous.

Likewise uncontradicted is May's testimony that the mistakes in NMTV's applications were unintentional and stemmed primarily from his reliance on outdated files. (TBF Ex. 105, pp. 20-21; Tr. 3538-40, 3596-99) While the main error was failure to list common officers

^{34/} Office of Communication of the United Church of Christ v. FCC, 425 F.2d 543, 549 (D.C. Cir. 1969); Ramon Rodriguez and Associates, Inc., 9 FCC Rcd 3275, 3277 (Rev. Bd. 1994); Barry Skidelsky, supra, 7 FCC Rcd at 9.

of NMTV and TBN, those officers *were* disclosed in many FCC ownership reports and in NMTV's Wilmington application, all filed before any question was raised about the relationship of NMTV and TBN. (Pp. 15-16 supra; TBF Ex. 101, Tab R, pp. 89, 95; Tr. 3542-43) Thus, there was no intent to conceal those facts. Pinelands, n. 28 supra.^{35/}

The Bureau is right: "NMTV's omissions did *not* occur because of an intent to deceive the Commission" and "loss of TBF's license is *not* the appropriate sanction" (p. 17 supra).

De Facto Control. Although the ALJ declared he would decide the *de facto* control issue "based on the Commission's decisions dealing with control" (Tr. 491) and the record of "who made the decisions" for NMTV (Tr. 479), the ID fails to do so. On each *de facto* control criterion, the ALJ ignored a vast body of evidence and precedents showing that TBN's relationship with NMTV was not *de facto* control and that NMTV's minority Board members made decisions and retained control. (TBF F&C ¶¶601-49).

The ALJ completely ignores the case law establishing that control of personnel lies with those having authority to hire and fire.^{36/} He ignores the plain evidence that it was

^{35/} Also untenable is the ALJ's finding of intent simply from presumed motive ("it was intentional deception since disclosure would have thwarted TBN's and Crouch's ambitions"). (ID ¶331) Intent to deceive is not proved by the mere existence of some arguable motive. Atlantic City Community Broadcasting, Inc., 8 FCC Rcd 4520 (¶4) (1993). The ALJ's citation to Black Television Workshop, 8 FCC Rcd 4192, 4198, n. 41 (1993) (ID ¶330), is inapposite because there the FCC did *not* infer intent merely from motive, but from the whole record which, unlike this case, involved *no* compelling evidence of voluntary disclosures or testimony of FCC counsel *negating* a finding of intent to deceive, and contained affirmative evidence, absent here, that a document had been belatedly fabricated to mislead the FCC.

^{36/} Tri-Counties Communications, Inc., 31 FCC 2d 83, 85 (1971); Phoenix Broadcasting Co., 44 FCC 2d 838, 840 (1973); J. Dominic Monahan, 6 FCC Rcd 1867 (MMB 1991); Stereo Broadcasters, 87 FCC 2d 87, 96 (1981); BBC, 10 FCC Rcd at n. 24; David A. Davila, 6 FCC Rcd 2897, 2899 (1991), affirming 5 FCC Rcd 5222 (Video Services 1990); TBF F&C ¶614.

NMTV's Board and Duff who exercised that authority.^{37/} He ignores the showing that NMTV employed station staffs well above the level that might suggest a *de facto* control violation.^{38/} And, while criticizing Ben Miller's engineering assistance to NMTV (ID ¶1319), he ignores the detailed demonstration that Miller's responsibilities at TBN far exceeded his limited assistance to NMTV, and that he lacked any authority at all over NMTV's staff.^{39/}

Further, what the ALJ *does* address, he decides wrongly. Most astonishingly, he finds *de facto* control from the fact that Crouch "has always served simultaneously as an officer and director of both TBN and TTI/NMTV" (ID ¶1317). That overlooks two obvious and fundamental points: (a) that the minority exception in §73.3555 *encourages* broadcasters to hold such cognizable interests "simultaneously" in both licensees (pp. 3-4 supra); and (b) that the FCC *granted* the NMTV applications knowing that NMTV's Bylaws authorized Crouch to "supervise, direct and control" NMTV's business and officers and "select and remove all agents and employees of the corporation" (p. 15 supra). The ID thus erroneously finds a *de facto* control violation when Crouch was complying with the premise of §73.3555(e) and held

^{37/} TBF Ex. 101, Tab EE, p. 36; TBF Ex. 102, pp. 20-21; Tr. 1806, 2058-60, 4452. See also, TBF Ex. 101, pp. 47-48, 50, and Tab EE, pp. 20, 22, 27, 29-30, 33, 35; Tr. 1796, 1908-12, 2046, 2080, 2259-60, 2781; TBF F&C ¶¶188-89.

^{38/} David A. Davila, 5 FCC Rcd 5222, 5224-26 (VSD 1990); Roy R. Russo, 5 FCC Rcd 7586 (MMB 1991); Peter D. O'Connell, 6 FCC Rcd 1869 (MMB 1991); Brian M. Madden, 6 FCC Rcd 1871 (MMB 1991); Michael R. Birdsill, 7 FCC Rcd 7891 (MMB 1992); TBF F&C ¶618.

^{39/} The record shows that Miller spent less than an hour a month helping NMTV stations (whose Chief Engineers reported to the station managers and Duff), whereas at TBN he supervised more than 100 employees and the Chief Engineers reported to him. (GL Ex. 210, pp. 35, 96-97, 98, 127, 138-39; MMB Exs. 328, 335; Tr. 4432, 4466, 4500; TBF F&C ¶202; TBF Rep F&C ¶¶171-72) It is not a "contrivance" (ID ¶1319) to call one who acts as a watchdog for technical matters a consultant. Consultant is the FCC's *own* word. Stereo Broadcasters, Inc., supra, 87 FCC 2d at 97-98; TBF F&C ¶623.

the *de jure* authority conferred by FCC grant.^{40/} Also wrong is the conclusion that Duff's work for NMTV was "simply a part of her routine TBN duties" (ID ¶1317) -- a finding that disregards the material and fundamental differences between Duff's responsibilities at the two companies.^{41/} At NMTV the Station Managers report to Duff; at TBN they do not.^{42/} At NMTV Duff hires the Station Managers and Chief Engineers; at TBN she does not.^{43/} And at NMTV she hires or supervises the hiring of staff; at TBN she does not.^{44/} The ALJ simply shut his eyes to the evidence that NMTV's personnel are under minority control while TBN's are not.^{45/}

Remarkably, the ALJ shows no understanding that significant management and technical assistance in areas like engineering, law, accounting, and finance -- precisely the assistance TBN gave NMTV -- was the *goal* of the minority ownership policy (pp. 3-4 and n.

^{40/} The FCC recognizes that *de jure* authority granted by company bylaws is not, and could not conceivably be, unauthorized *de facto* control under §310. Turner Broadcasting System, Inc., 101 FCC 2d 843, 848 (1985); TBF F&C ¶¶610, 635.

^{41/} Though the ALJ declared, "I'd just like to get to where we start talking about what [Duff] did at ... NMTV and TBN" (Tr. 563-64), he then ignored all of the following evidence: TBF Ex. 101, pp. 36, 37, 43, 46-51 and Tab Z; TBF Ex. 106, p. 14; TBF Ex. 109, pp. 6-11, 13-14; TBF Ex. 112; TBF Ex. 113; TBF Ex. 119; MMB Ex. 107, p. 2; MMB Ex. 233; MMB Ex. 309; MMB Ex. 317; GL Ex. 104; Tr. 1341, 1419, 1571, 1751-52, 1787, 1795-99, 1820-21, 1861, 1908-12, 2076, 2118, 2129, 2145, 2150, 2163, 2208-09, 2211, 2247-48, 2257, 2259-60, 2266-67, 2466, 2467-68, 3051, 3858, 4197, 4283, 4432, 4452, 4472, 4473; TBF F&C ¶63.

^{42/} TBF Ex. 101, p. 36; TBF Ex. 109, pp. 9, 10-11; MMB Ex. 107, p. 2; MMB Ex. 309; MMB Ex. 317; Tr. 4432, 4452; TBF F&C ¶¶63, 648.

^{43/} TBF Ex. 101, p. 36, 46-48; Ex. 109, pp. 6-8; Tr. 1795-97, 1908-12, 2257, 2259-60.

^{44/} TBF Ex. 101, pp. 36; Ex. 109, pp. 10-11; Ex. 112; Ex. 113.

^{45/} It is immaterial that, while hiring complete staffs for two full power stations, Duff twice received personnel references from TBN staff. BBC, *supra*, 10 FCC Rcd at n. 24.

5 supra). Likewise, the ALJ misses the whole point of the minority ownership policy in concluding that TBN had *de facto* control of NMTV's finances because NMTV was "dependent" on TBN financing to acquire its stations. (ID ¶¶306, 312-13) The FCC adopted the policy precisely to *encourage* broadcasters to provide such financing and thus alleviate a "pressing dilemma" created by the inability of minorities to obtain capital from other sources. Minority Ownership, 92 FCC 2d at 856; TBF F&C ¶¶591-94, 597, 600; TBF Rep F&C ¶15. The policy is completely defeated if broadcasters who supply that capital then find such action cited as evidence of a *de facto* control violation.^{46/}

The ALJ's treatment of financial control is flawed in other respects as well. While professing interest in who made decisions, he ignores many financial decisions made by NMTV's Board. (TBF Ex. 101, Tab EE, pp. 7-42; TBF F&C ¶214) He ignores a formal agreement and Board resolution that entitled NMTV to terminate TBN's financial services at will, despite a Commission holding that a licensee delegating such functions retains control if it retains the right to revoke the delegation. The Alabama Educational Television Commission, 33 FCC 2d 495, 508 (1972); TBF Ex. 101, Tab W, p.2, Tab EE, p.1; TBF F&C ¶¶195, 619-20, 634. He disregards all the case law confirming Colby May's opinion that the kinds of financial services TBN provided to NMTV did not amount to control.^{47/} And he

^{46/} The ALJ appears to have approached the *de facto* control issue from the erroneous premise that minorities *do* have access to sufficient financing, so that NMTV need not have relied on TBN. He suggested at the hearing that NMTV could have obtained funding from a MESBIC (Tr. 2015), evidently unaware that MESBICs typically are for-profit venture funds that do not invest in non-profit entities like NMTV.

^{47/} Ft. Collins Telecasters, 60 RR 2d 1401, 1408-09 (Rev. Bd. 1986); Pentecostal Revival Association, Inc., 1 FCC Rcd 842 (Rev. Bd. 1986); High Sierra Broadcasting, Inc., 96 FCC (continued...)

ignores the facts that, before questions about NMTV's *bona fides* were raised, (a) Duff sought a replacement for TBN's services, (b) Duff negotiated and cut in half the fee that TBN wanted to charge, and (c) Crouch viewed that negotiated agreement and NMTV's ensuing payments to TBN as a step toward NMTV's ultimate termination of TBN's services. (TBF Ex. 101, p. 40; Tr. 1424-27, 2999-3000; TBF F&C ¶¶204, 209) When the ALJ *did* consider evidence, he decided wrongly. That a CPA firm included the finances of TBN and NMTV in a combined report (ID ¶309) does not prove *de facto* control. Accounting treatment for reporting purposes is irrelevant to determining *de facto* control. Fox, 10 FCC Rcd at 8520. The finding that TBN treated NMTV with the same "*modus operandi*" as TBN-controlled companies is flatly wrong. (ID ¶312) The record clearly shows that NMTV's network revenues were treated differently from the revenues of TBN-controlled stations.^{48/}

Also wrong is the ALJ's criticism of TBN for financing NMTV without formal notes or interest. (ID ¶312) Accountings of the loans were maintained and reported to the IRS, and NMTV always intended to repay them.^{49/} Further, Crouch and Juggert both explained the informality: since Crouch was on the NMTV Board and thus had knowledge of NMTV's affairs, TBN did not require as formal an arrangement as it would of a company with which he had no such relationship. (TBF Ex. 104, p. 16; Tr. 2997-98, 3819, 3820-21, 3956; TBF

^{47/}(...continued)

2d 423, 435 (Rev. Bd. 1983); Hispanic Keys Broadcasting Corporation, 3 FCC Rcd 3584, 3585 (Rev. Bd. 1988); TBF F&C ¶634; TBF Rep F&C ¶156.

^{48/} TBF Ex. 101, p. 41; TBF Ex. 119, p. 157; Jt. Ex. 1, p. 24; Tr. 3809, 3835, 3953; TBF F&C ¶218, TBF Rep F&C ¶249.

^{49/} Tr. 1675, 1701, 1772, 1779, 2151, 2343-44, 2874-75; MMB Ex. 272, p.3; MMB Ex. 325, p. 3, MMB Ex. 375, p. 12; MMB Ex. 398, p. 13; TBF F&C ¶¶222, 630.

F&C ¶¶223-24) The ALJ ignored that testimony and disregarded the FCC cases establishing that these circumstances do not constitute *de facto* control.^{50/}

The ALJ further errs in holding that, because NMTV was not driven by "return on investment," TBN controlled NMTV's decisions to sell the Odessa station to Prime Time and later to forgive Prime Time's debt rather than force bankruptcy. (ID ¶¶314-15) The fact is that NMTV is a public charity, not a commercial venture, and the primary responsibility of its Directors was to effectuate NMTV's charitable purposes. Guided by that consideration, the Directors all stated clear reasons for their decisions on Prime Time.^{51/} From this it is apparent that the decisions were made by NMTV, not by TBN as the ALJ surmised.

The ALJ's conclusions about NMTV's network programming contravene both the case law and the Constitution. The ALJ found *de facto* control from the fact that NMTV broadcast TBN programming. (ID ¶320) However, programming affiliation does not

^{50/} Southwest Texas Public Broadcasting Council, 85 FCC 2d 713, 714-16 (1981); The Seven Hills Television Co., 2 FCC Rcd 6867, 6881-82 (Rev. Bd. 1987); La Star Cellular Telephone Co., 7 FCC Rcd 3762, 3767, n. 14 (1992); TBF F&C ¶¶631-32. The ALJ also wrongly concludes that no one "ever questioned" the erroneous accounting of NMTV's LPTV expenses. (ID ¶311) That error was voluntarily corrected in tax filings long before any issue was raised about the TBN/NMTV relationship. (Jt. Ex. 1, pp. 18-19; MMB Ex. 272, p. 1)

^{51/} Duff wanted the programming to continue and, as a minority who launched the Odessa station, wanted not to press an enforcement that would make NMTV's first station seem a failure. (Tr. 1884, 2230-32; TBF F&C n. 33) Hill made a spiritual judgment that NMTV should not force Prime Time's station into failure; he felt that helping Christian programming survive was a greater value. (Tr. 1981, 2005, 2040; TBF Ex. 102, p. 25; TBF F&C ¶166) Ramirez deemed the decision a "charitable act" given NMTV's "shared values" with Prime Time. (Tr. 4071-72, 4119-20; TBF F&C n. 33) See also TBF Rep F&C ¶¶76-79. The ALJ badly understates the consideration that NMTV's Board gave to the Prime Time matter. (ID ¶315) In fact, the Board had "several" discussions over one year before deciding the matter. (TBF Ex. 102, p. 25; Tr. 1981, 2005, 4072, 4121; TBF Rep. F&C ¶77) Had TBN controlled, there would have been no discussions, but a directive from TBN.

constitute *de facto* control. Fox, 10 FCC Rcd at 8519; BBC, 10 FCC Rcd at 7932; Seven Hills, 2 FCC Rcd at 6881-82; The O.T.R.H., Inc., FCC 87I-097 (9/8/87); Davila, *supra*; Spanish International Television Co., 5 RR 2d 3, 6, 7 (1965); TBF F&C ¶¶605-07. Moreover, each Director of NMTV wanted to affiliate with TBN,^{52/} and it was their constitutional right to do so. Branti v. Finkel, 445 U.S. 507, 514-15 (1980); TBF F&C ¶¶605, 673-80.^{53/}

With respect to local programming, the ALJ (at ID ¶320) paid no attention to the reasons why NMTV did not initially broadcast more local programs. The record shows that in Portland NMTV at the very outset planned for local minority-oriented programming, purchased studio space, and hired an experienced local programmer.^{54/} Studio construction problems delayed the effort. When those problems were resolved, however, the plan was implemented, and NMTV airs 16 hours a week of local programs.^{55/} In Odessa, Duff and Espinoza refused to abandon plans for local programming until Duff's efforts to obtain cable carriage failed and insufficient revenues made it infeasible to construct a local production

^{52/} TBF Ex. 101, pp. 44-45; TBF Ex. 102, p. 11; TBF Ex. 103, p. 11; TBF Ex. 104, p.9; TBF Ex. 106, pp. 16-17; TBF Ex. 107, pp. 198-99; Tr. 1758-59, 4143; TBF F&C ¶176.

^{53/} The only difference between TBN and the networks involved in the cited cases is the religious character of TBN and the ALJ's highly inappropriate personalization of the Christian religion to Dr. Crouch. (Tr. 3100-04) Although TBN's network service includes programs of well known national ministries and a broad range of denominations (TBF Ex. 104, p.5; Tr. 1577, 1758; TBF F&C ¶¶7, 176), the ALJ called it Crouch's "point of view" (Tr. 3100) and "the faith that Reverend Crouch professes" (Tr. 3103). He also found it significant that "Ms. Duff...and Reverend Crouch were both on the same wavelength." (Tr. 3103-04) When the FCC starts to read the "wavelengths" of citizens for their religious views, that is an appalling violation of the First Amendment. Wooley v. Maynard, 430 U.S. 705 (1977); Shelton v. Tucker, 364 U.S. 479, 486 (1960); TBF F&C ¶675.

^{54/} TBF Ex. 101, p. 5 and Tab C, p.1, Tab EE, pp. 20, 27, 29, 32-36; TBF Ex. 106, p. 11; TBF Ex. 109, pp. 8, 13; TBF Ex. 119, p. 99; Tr. 2291, 4458; TBF F&C ¶¶181-82.

^{55/} TBF Ex. 101 pp. 48-49; Ex. 109 pp. 13-14; Tr. 4404-06, 4425, 4469-72; TBF F&C ¶¶181-85.

facility.^{56/} TBN did not make those decisions.^{57/}

Finally, the ALJ's denigration of Duff is totally unjustified. (ID n. 41) The ALJ treats Duff like Ralph Ellison's Invisible Man, a minority person whose accomplishments will not be seen. One need only read TBF Ex. 101 to know what a strong and remarkable person Duff is. Exercising her *own* judgment, she *opposed* Crouch on building the Houston LPTV station, *opposed* him on selling the Odessa construction permit, and *opposed* him on divesting the Odessa station immediately upon construction. (TBF F&C ¶¶40-53, 643-48) Those facts belie the conclusion that Crouch controlled her. BBC, 10 FCC Rcd at 7932 (rejection of alleged controlling party's acquisition proposals negates finding of improper control). Duff also brought to NMTV a unique minority perspective and a resolve to make a minority-

^{56/} TBF Ex. 101, pp. 45, 53; Tr. 1857-58, 1883, 4227-28, 4232-37, 4242-43; TBF F&C ¶¶40-46, 75, 77-78, 186.

^{57/} The ALJ indulges in pure fiction when he concludes, "When it was not in TBN's interest to construct a studio in Odessa capable of originating local programming, the studio was not built. By contrast, when it benefitted TBN to have such a studio at TTI/NMTV's Portland, Oregon, station...the money and personnel that were needed became immediately available." (ID ¶316) No evidence ties those decisions to TBN's interests. The ALJ simply ignored the extensive record showing why those decisions were made. The ALJ also errs in finding that a TBN newsletter calling NMTV a "Satellite Division" proves *de facto* control. (ID ¶321) The item (which was discontinued over 10 years ago) was drafted by TBN's publicity department to raise funds for Pastor Espinoza's program, and Crouch understood it to mean that NMTV would be TBN's LPTV satellite affiliate, at a time when LPTV satellite broadcasts were a new concept. (Tr. 2555-56) There is no evidence that Crouch construed the word "division" in terms of a formal legal relationship as the ALJ did, and the FCC has recognized that trying to draw such "legal distinctions" from such publications is irrelevant to determining control. Fox, 10 FCC Rcd at 8522, n. 91. Moreover, the fact that the newsletter was "held out to the public" (ID ¶321) refutes the notion that Crouch believed that there was anything improper about the TBN/NMTV relationship. A party trying to conceal improper activity does not openly hold out that activity to the public. Christian Broadcasting, *supra*; Phoenix Media Corp., 2 FCC Rcd 498, 499-500 (1987) (issuance of a press release and trade publication containing the subject information are "inconsistent with an intent to conceal").

owned business succeed. (TBF F&C ¶644) Appreciating none of this, the ALJ refused to see that Duff functioned in her own right.^{58/} The evidence shows that she did.

Other Errors. To disqualify TBF on this record would be to apply a materially stricter standard to Trinity than has been applied to other licensees found to have violated unclear standards in complicated areas of law. In two analogous cases involving *de facto* control and alien ownership violations, the FCC imposed no sanction and instead allowed the offending licensee to bring itself into compliance. Seven Hills, 2 FCC Rcd at 6888-89 (conditioning renewal on licensee modifying current practices to achieve compliance); Fox, 10 FCC Rcd at 8523-24 (permitting licensee in violation of alien ownership benchmark opportunity to comply with benchmark or make showing justifying exception). In the instant case -- the first case under the FCC's minority exception policy -- TBF must be given the same chance if a violation is found. Melody Music, Inc. v. FCC, 345 F.2d 730 (D.C. Cir. 1965).

Disqualification premised on TBN's relationship with NMTV would also contravene the mandate of the Religious Freedom Restoration Act, 42 U.S.C. §2000bb-1, that the government may not burden a person's exercise of religion except by "the least restrictive means" in furtherance of a compelling governmental interest. TBN is a religious organization and is entitled to associate with minorities who share its religious beliefs and goals. If that association is found to have violated FCC policy notwithstanding TBN's rights under the Constitution (see TBF F&C ¶¶673-80), disqualification clearly is not the "least restrictive"

^{58/} Spanish International, 5 RR 2d at 6 (speculation does not support finding a principal beholden to employer); Fox, 10 FCC Rcd at 8522 (employee cannot be assumed to be all-purpose agent of employer); Southwest Texas, 85 FCC 2d at 714-16; Seven Hills, 2 FCC Rcd at 6883; Reexamination of Cross-Interest Policy, 2 FCC Rcd 3699 (1987); TBF F&C ¶640.

sanction. It is the harshest of all sanctions. If there is a compelling governmental interest at all in penalizing TBF, no reason appears why a less extreme penalty would not suffice.^{59/}

IV. GLENDALE'S BASIC QUALIFICATIONS

Trinity excepts to the ALJ's failure to disqualify Glendale for lack of candor by George Gardner and Raystay Company ("Raystay") in multiple applications filed with the FCC -- patent misconduct that the ALJ excused as "exaggeration." (ID ¶335) Even though Gardner is formally under "heightened scrutiny" by the Commission for his lack of candor in an earlier FCC proceeding,^{60/} the ALJ accepted his self-serving testimony at face value, ignored extensive incriminating evidence, and reached exculpatory conclusions that defy common sense and cannot survive any reasonable assessment of the record.

Contrary to the ALJ's finding, Raystay's two sets of LPTV extension applications were clearly calculated to convey the false impression that Raystay *intended* to build the stations and was *actively working* toward construction. In truth, Gardner had no construction plans and was trying instead to sell the permits, having decided that the contemplated LPTV

^{59/} The relationship between TBN and NMTV was typical of how nonprofit religious organizations assist one another, as NMTV's Directors clearly recognized. (Tr. 2007-08, 2343, 2875, 2997, 4301-02) Where, as here, freedoms of religious exercise, governance, association, and speech are involved, "subjecting the exercise of First Amendment rights to the prior restraint of a license, without *narrow, objective, and definite standards to guide the licensing authority*, is unconstitutional." Shuttlesworth v. City of Birmingham, 394 U.S. 147, 150-51 (1969); TBF F&C ¶¶673-80. The FCC is itself unsure how control functions in nonstock corporations, having sought "additional information" on how such organizations operate and acknowledged that its present lack of an articulated policy "has created a degree of uncertainty among our licensees." Non-Stock Entities, 4 FCC Rcd at 3403, 3406. Absent clear standards, disqualification of TBF violates the constitutional test. See also A. V. Bamford v. FCC, 535 F. 2d 78, 82 (D. C. Cir 1976) ("elementary fairness requires clarity of standards sufficient to apprise an applicant of what is expected").

^{60/} TBF Exs. 257, 260; RKO General, Inc. (WAXY-FM), 5 FCC Rcd 642, 644 (1990).

operation was not viable without cable carriage, which he could not secure. But he withheld this from the Commission, for the obvious reason that he would risk forfeiting the permits (hence the chance to sell them) if he disclosed that no construction was planned.

Totally undercutting the ALJ's exoneration of Gardner is Gardner's own stunning admission of the real reason he wished to extend the LPTV permits -- an admission made under cross-examination that the ALJ, astonishingly, fails to mention. What follows is the ALJ's finding on this key point, as directly refuted by Gardner himself:

Initial Decision ¶262

"The possibility of selling the construction permits played no role in the decision to file applications to extend the Lancaster and Lebanon construction permits in December 1991 or July 1992."

George Gardner (Tr. 5277)

"[W]e had Mr. Shaffner who was going to take TV40 off our hands. And *I was interested in preserving the construction permits in the event that he wanted those.*"

TV40 was Raystay's only operational LPTV station and had lost large sums of money since going on the air in 1989. (ID ¶222) Raystay's plan for the five new permits granted in 1990 was to create a regional network of LPTV stations with TV40 as the hub. But the viability of the plan depended on cable carriage. (ID ¶¶219-20) When Raystay found that it could not secure cable carriage, it stopped work on the plan. (Tr. 5214-20) As far as Gardner was concerned, building more stations was out of the question:

"My experience with TV40 absolutely got in my way of doing anything without having a viable business plan. I had learned my lesson there. And *there was no way that I was going to go ahead.*" (Tr. 5270)

Gardner believed that a business plan had to show a break-even point within a reasonable time. (Tr. 5274) He saw no such prospect if he expanded Raystay's LPTV operation by building the new stations. To the contrary, he testified:

"If I can't see a way to make the payroll, then I can't see how to stay in business. So *this was pretty clear to me that I couldn't go through with it*. I was having enough difficulty with TV40 that *I certainly couldn't take on any additional burden*." (Tr. 5276)

With TV40 losing money as a stand-alone and the concept of a regional LPTV network now unworkable, Gardner sought to sell TV40 and the additional construction permits. After one deal collapsed in August 1991, Raystay opened negotiations with Trinity, which formally offered in November 1991 to buy all of the unbuilt permits. (TBF Exs. 233, 234) Raystay was also negotiating a possible sale to Robert Shaffner, whose main interest was TV40 but who expressed some interest in the permits as well. (ID ¶258) In early December 1991 Gardner unilaterally ruled out Trinity because he was about to challenge Trinity's Miami license, but he instructed his subordinates that it was "OK to transfer to anyone else you may wish to work with." (ID ¶257) Indeed, Raystay *did* arrange the sale of one LPTV permit to Dennis Grolman. (ID ¶¶264-99)

Barely three weeks after cutting Trinity off, Gardner personally reviewed and signed Raystay's applications to extend the four remaining unbuilt permits. Raystay represented as one reason for grant that **"no other entity has expressed an interest in providing this service."** Raystay further claimed that it **"has entered into lease negotiations"** with the site owners, that it was in **"continuing negotiations with local cable television franchises,"** and that a **"representative of Raystay and an engineer have visited the antenna site and ascertained what site preparation work and modifications need to be done."** (TBF Ex. 245, pp. 3-4) Not only were those statements materially misleading, but Raystay did not disclose the following undisputed facts, which completely belied the impression Raystay sought to convey: (a) that Raystay felt it had no viable business plan for building the stations (Tr. 5269-70); (b) that this

was the only reason there had been no construction (Tr. 5236); (c) that Gardner had no idea when or if Raystay would *ever* develop a viable business plan (Tr. 5236-37); (d) that he had no intention of constructing without a viable business plan (Tr. 5270); (e) that Raystay was working diligently to sell TV40, which it considered its LPTV "hub" and essential to developing the new stations; (f) that the construction permits "would not have been any use to us without TV40" (Tr. 5278); (g) that at least one entity (Trinity) *was* seriously interested in acquiring the permits and launching service to the public; and (h) that Gardner wished to "preserv[e] the permits" in case a buyer wanted them in a package with TV40 (Tr. 5277).

Overlooking everything that Raystay thus concealed, the ALJ credited Gardner's self-serving and demonstrably contrived claim at the hearing that he never abandoned the basic business plan and always intended to build the LPTV stations. (ID ¶¶246, 263, 344) That claim is irreconcilable with the overwhelming weight of the record, especially the admissions cited above. It is beside the point that Raystay ultimately did not sell TV40, a fact the ALJ found significant (ID ¶¶263, 344); Raystay clearly was *trying* to sell TV40 and (as Gardner admits) had no present intent to construct the new stations when it filed the LPTV extension applications. The ALJ also badly missed the point in finding that Raystay "would gain little from selling the bare permits" since it could recover no more than its costs. (ID ¶345) As Gardner plainly recognized, a buyer (like Shaffner) might find TV40 more attractive if packaged with the permits, whose real value to Raystay was thus in increasing the marketability and sale price of TV40 (which was *not* capped under the rules). The ALJ also erred in finding nothing improper about seeking an extension just to sell the permits (ID ¶346). The great weight of authority, which the ALJ ignored, is that extensions will be *denied*

if (as here) the purpose is to sell, or if (as here) the permittee made a private business decision not to build.^{61/} Thus, contrary to the ALJ's finding, Raystay had ample motive to conceal both the reason for no construction (no viable business plan) and the reason for wanting the extensions (preserve the permits for sale with TV40).

Equally indefensible is the ALJ's dismissal of Raystay's misrepresentations as innocent "imprecision and exaggeration" (ID ¶335). Raystay outright lied when it said that **"no other entity has expressed an interest in providing this service."** Trinity, for one, was expressing strong interest. Raystay compounded the deception by saying that **"an engineer"** had visited the sites, never disclosing that it was *Trinity's* engineer, who went not to advance construction by Raystay but to check the sites for Trinity before it bought the permits. Likewise, Raystay lied in claiming it had **"entered into lease negotiations"** with the site owners. The ALJ made no effort to explain how a single cold call by David Gardner, in each case through an office receptionist before he reached some anonymous "manager" (Tr. 4703), with total connection time of 60 seconds (TBF Ex. 228), during which no lease terms were discussed, and whose purpose was to facilitate *sale* of the permits to Trinity by arranging a site visit for *Trinity's* engineer (Tr. 4707), can possibly qualify as "lease negotiations," or even "discussions," a term the ALJ would have preferred (ID ¶342). Moreover, accepting David Gardner's absurd account at face value, the ALJ disregarded compelling testimony by the two disinterested site

^{61/} See authorities cited in TBF F&C, pp. 481-84. The two cases cited by the ALJ are inapposite. In Sandino Telecasters, 8 FCC Rcd 2573, 2575, n. 6 (1993), the Commission, noting that construction permits may be assigned, did *not* hold that an unbuilt permit will be *extended* just so it can be assigned. In Beacon Radio, Inc., 18 FCC 2d 648, 649-50 (1969), the FCC extended a permit to allow assignment only because the permittee's failure to construct "resulted from unforeseen circumstances [medical disability] which were beyond its control," which justified assignment in these "limited circumstances."

owner/managers, Edward Rick and Barry March, establishing that the alleged conversations almost certainly never took place. Each was adamant that he was the only person in his office who would have spoken to a caller like David Gardner and that he recalled no such conversation. Both testified that the call screening procedures at their offices would have consumed up to a minute (Rick) or two minutes (March) before they themselves would pick up, even if they were available and willing to take the call. March almost surely was not there to take the 9:08 a.m. call to his office, because he typically did not leave home until at least 9:30 and then had a 40 minute commute.^{62/} And since a surprised Rick had no prior notice when Trinity's engineer appeared at his office six days later (TBF/GL Jt. Ex. 6, p. 41), it is clear that David Gardner had not spoken to Rick. The ALJ acknowledged none of this evidence, which thoroughly impeaches David Gardner.^{63/} Unable to explain these difficult facts, the ALJ acquitted Raystay simply by imagining that if Raystay had *wanted* to tell a lie, it "would have gone far beyond" the lie it told. (ID ¶342)^{64/}

Also a flat misrepresentation was Raystay's claim of "**continuing negotiations**" with local cable operators. By the time Raystay filed its first extension applications in December

^{62/} See TBF/GL Jt. Ex. 5, pp. 66, 70-71, 94-97, 99-101, 105, 123-24 (March); TBF/GL Jt. Ex. 6, pp. 41, 75-80, 82-84 (Rick).

^{63/} Likewise ignored by the ALJ was a direct contradiction that further impeaches David Gardner. His confession under cross-examination that he did *not* discuss lease terms in either of the 60-second telephone calls (Tr. 4724-26, 4732-33, 4741) proves that he lied in his earlier sworn statement (answering Trinity's motion to enlarge) that "I generally discussed possible lease terms with both individuals" (TBF Ex. 246, p. 1).

^{64/} Equally untenable is the ALJ's theory that if Raystay had intended to deceive, it would not have admitted that construction had not started. (ID ¶339) Under §73.3534(b), Raystay only had to show "substantial progress," which, as proven by the extensions granted to Raystay, need not include actual construction. Raystay clearly was trying to persuade the Commission that it had made "substantial progress" when in fact it had not.

1991, the cable operators had long since declined Raystay's request for signal carriage, and there had been no discussions for months. This is clearly established by the testimony of Harold Etsell, whom George Gardner had assigned to develop the LPTV project. Etsell testified that his discussions with cable operators ceased in early 1991, that Gardner told him around March 1991 to stop working on the project, that he never came back to it, and that he was unaware of any subsequent activity concerning the LPTV permits. (TBF Ex. 265, pp. 51-67, 95-97, 104-06, 109) The ALJ, again ignoring George Gardner's candor history and "heightened scrutiny" status, charitably accepted Gardner's self-serving claim that "I feel certain I reassigned" Etsell to work on the LPTV business plan later in 1991 (Tr. 5321; ID ¶246). Etsell, who obviously would have remembered that, states unequivocally that it never happened. The ALJ also had no basis for crediting the claims of George and David Gardner that *they* had occasionally spoken to cable operators (ID ¶¶244-45, 340). Those claims were plainly witness stand inventions. The Gardners had said no such thing when addressing the subject in their prepared written testimony, where both defended Raystay's "continuing negotiations" statement solely on the ground that *Etsell* had talked to cable operators. (GL Ex. 208, pp. 5-6; GL Ex. 209, p. 6) Moreover, the ALJ fails to explain how a chance encounter with a cable operator could possibly qualify as "continuing negotiations" anyway.

The record does not support the ALJ's finding that George Gardner personally had no reason to disbelieve Raystay's "lease negotiations" claim (ID ¶349) and no intent to deceive the Commission (ID ¶335). Gardner, who had pledged to the FCC that he would personally ensure the truth and accuracy of any applications he filed (TBF Ex. 258, p. 3), had every reason to know there was no truth to the claim that Raystay had "entered into lease